

March 28, 2006

By Facsimile Transmission and By E-Mail

Mr. Richard Chavez
Commodity Procurement Policy & Analysis Division
Farm Service Agency
U.S. Department of Agriculture
1400 Independence Avenue, S.W., Room 5755-S
Washington, D.C. 20250-0512

Re: Notice of Proposed Rulemaking, 7 CFR Part 1496, RIN 0560-AH39
(70 Fed. Reg. 74717, December 16, 2005), Procurement of Commodities
for Foreign Donation

Dear Mr. Chavez:

These comments are being submitted in response to the above described Notice of Proposed Rulemaking (NPRM). Although our submission is being filed after the deadline for comments (i.e. March 9, 2006), we hope that these comments can be made part of the docket in this proposed rulemaking.

The American Maritime Congress (AMC) is an association of U.S.-flag ship operating companies, with vessels in the domestic and international trades, and the Marine Engineers' Beneficial Association, our Nation's oldest maritime labor organization. Many of the vessels of these companies transport U.S. Government generated cargo, the carriage of which could be impacted by this proposed rule.

AMC has long played a significant role as a maritime industry coordinator on all aspects of various cargo preference laws, such as that within the purview of this NPRM. In this process, it has worked closely with maritime industry representatives as a coalition builder, with U.S. Government departments and agencies, with Members of Congress, and with representatives of other affected industries, such as agriculture commodity and processing groups and private voluntary organizations.

In this role, AMC has been guided by several general principles. All are relevant in the case at hand.

Proposed legal, regulatory, or administrative changes should be consistent with the letter, spirit, and intent of cargo preference law and not result in reductions in cargo for U.S.-flag

vessels. Such cargo is vital to preserving the U.S.-flag fleet on the sealanes of the world and thus to the economic and military security of the United States. Given the on-going War on Terror and the integration of the U.S.-flag fleet, its intermodal systems, and its American merchant mariners into national defense planning and sealift force projection, this U.S.-flag fleet role is more important than at any time since World War II.

AMC and its member companies support measures to improve the application of U.S.-flag cargo preference law and make it more efficient, flexible, "user-friendly," and up-to-date to account for changing circumstances and commercial practices. The "one-bid" principle is one of these, and we support it. AMC strongly believes that – rather than a "zero-sum" result – both objectives, improvements and continued provision of cargo for U.S.-flag vessels, can be accomplished together.

Success in this undertaking is most likely when it results from a constructive, cooperative effort that involves all affected parties, public and private sector, and that incorporates and melds the concerns and suggestions of these parties into an outcome in which at the end all involved have a positive stake.

With these general principles in mind, we have four key comments we would like to make concerning this NPRM. We are not providing any specific recommendations regarding operational details, because, as we note below, it would be premature to do so given the absence of detailed information in the NPRM and given that a number of U.S.-flag ship operators have already cited several areas where changes in current practice could have significant effect.

Our first comment is that this NPRM does not provide sufficient information concerning the revised procurement procedures to gauge their potential impact and thus the opportunity for the public to provide the "meaningful and informed comment" that is mandated by law. This point has been made, and justified in substantial detail, by others, and we agree with them. We would only add that this lack of information is at odds with the Commodity Credit Corporation's stated objectives, "to add clarity to the commodity bid evaluation process" or that "specificity is desirable."

Second, the NPRM states that, "under such a system, the cargo preference requirements would be determined initially and not subject to a change of carriers. This should reduce the ocean freight costs considerably because the tonnage would be consolidated by the carriers' bids and by allowing lowest-landed cost and cargo preference requirements to determine the U.S. delivery points." The NPRM, however, does not state these requirements, how they will be applied, or how compliance will be determined. Given the importance of cargo preference to our industry and to national security, and given that the details concerning the application of cargo preference and determination of compliance affect all carriers significantly and various carriers differently, it is important that the opacity in the NPRM be rectified before publication of the Final Rule.

The NPRM also states that "The Corporating Sponsor would be required to book freight at the rate KCCO used for the lowest-landed cost determinations, or a lower rate, except in circumstances where, in the opinion of the Contracting Officer and the applicable programs

agency's representative, extenuating circumstances. . . preclude such awards, or efficiencies and cost-savings lead to the use of different types of ocean service . . .”

We agree that such flexibility should be retained, but it should be circumscribed by clear limits to preclude “gaming” the system to avoid cargo preference or to provide unfair commercial advantage through the use of this flexibility. This is another example of the importance of the need for more information and specificity than is currently in the NPRM.

Third, the NPRM should be part of an effort that looks at the totality of cargo preference requirements and the procurement of commodities for donation overseas, a point also made by a number of others. The need for this was apparent to the Congress even in 1970, and it was stated more recently in 1999 by USAID in the following comments to the Maritime Administration (MARAD):

These issues have been addressed agency by agency on an *ad hoc*, rather than a comprehensive basis. We now have a web of Comptroller General Opinions, internal MARAD legal opinions and court decisions that interpret regulations that are no longer on point. Having rules, definitions or procedures that differ from one agency to another leads to confusion, misinterpretation and a sense of inequality.

Fourth, the previous three lead to our final comment – the importance of the effort represented in this NPRM, as well as the Freight Bid Entry System (FBES), being part of a broad, cooperative, and constructive effort that involves affected U.S. Government agencies and private-sector entities. That MARAD and affected private-sector entities, such as those in the maritime industry, should be a meaningful part of this process is, we believe, a matter of law, not choice. However, even if this were not so, it would be reasonable to do so, or, as one comment on the NPRM notes, “good business and prudent policy.”

To this end, we want to thank the CCC for providing this opportunity to comment, and we hope that our comments can be accepted late. We also wish to thank you for extending the original comment period at the request of ourselves and others, and for the public meeting held on February 21, 2006 at the Department of Agriculture. We urge that this be just the start of the inclusive cooperative effort we recommend above and that we so strongly believe can produce a constructive, comprehensive set of changes to increase efficiency, reduce costs, and above all, provide American food aid to those in need around the globe.

We stand ready, as does our entire industry, to be a part of such an important effort.

Sincerely yours,

Gloria Cataneo Tosi
President